Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LAURA DAVIS,

Petitioner,

vs.

WACHOVIA MORTGAGE COMPANY
f/k/a FIRST WACHOVIA MORTGAGE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is a civil litigant entitled to post-judgment relief pursuant to Federal Rule of Civil Procedure 60(b) when the evidence indicates that the litigant was denied her due process right to a trial on the merits on the grounds that the Petitioner was deprived of due process in that the decision of the court below was an abuse of discretion? The court, at the time it issued its opinion, applied an erroneous legal standard.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Wachovia Bank, N.A. and Wachovia Corporation are parent companies of the Respondent.

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Petitioner Laura E. Davis respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit in *Laura E. Davis v. Wachovia Mortgage Company, f.k.a. First Wachovia Mortgage Company*, number 97-9298, is not published. (App. A). The opinion of the District Court in *Laura E. Davis v. Wachovia Mortgage Company, f.k.a. First Wachovia Mortgage Company*, (Civ. No. 1:97-CV-1489, N.D. Ga. 1997), is not published. (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals"), was dated and entered on September 24, 1998. The Court of Appeals denied a timely petition for rehearing on November 13, 1998. (App. E).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty or property, without due process of law . . ."

Federal Rule of Civil Procedure 60(b)(1)and (6) provided:

> (b) On Motion and upon such terms as are just, the Court may relieve a party or a party's legal

representative from a final judgment, order or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect; or

(6) any other reason justifying relief from the operation of the judgment.

STATEMENT OF THE CASE

The fundamental question in this case is whether a litigant is entitled to relief from a judgment when a federal district court dismissed her complaint with prejudice because of failure to comply with local rules of court. This question arises in the context of Petitioner's Motion under Fed. R. Civ. P. 60(b)(1) and (6) ("Rule 60(b)(1)(6) Motion") to reopen a judgment that serves to permanently deprive Petitioner of her due process right to a trial on the merits on the ground that the Petitioner was deprived of due process in that the decision of the Court below was an abuse of discretion. The District Court failed to follow the heavy weight of precedent in dismissing pursuant to 41(b) motion. Further, this question arises in the context of Petitioner's motion under Fed. R. Civ. P. 60(b)(1)and (6) ("Rule 60(b)(1)(6) Motion") to reopen a judgment that serves to permanently deprive Petitioner of her due process right to a trial on the merits on the ground that the Court issued its opinion, it applied an erroneous legal standard or a standard contrary to precedent. To fully appreciate the significance of the issues presented by this case, it is essential to consider its procedural history.

A. Background Of The September 18, 1997 Judgment

Laura Davis, Petitioner herein, is a school teacher presently residing in a home purchased from Wachovia Mortgage Company on February 1, 1990. There were several items that survived the closing including a one year warranty per Georgia law. As a result of a controversy between the parties regarding their rights and responsibilities under the contract and warranty, lawsuits were filed in both the Fayette County Superior Court by Respondent for Declaratory Judgement on August 4, 1992. On September 11, 1992, Petitioner filed in Fulton County Superior Court for Breach of Contract, Breach of Warranty, Fraudulent and/or Negligent Misrepresentation and Intentional Infliction of Emotional Distress.

Petitioner subsequently dismissed her case without prejudice on October 25, 1996 due to the severe illness of her key witness. On April 23, 1997, Petitioner re-filed this action in Fulton Superior Court, Civil Action Number E-59005. Petitioner's Complaint again alleged breach of contract, breach of warranty, fraudulent and/or negligent misrepresentation and intentional infliction of emotional distress. This action was removed to District Court on May 22, 1997. On August 26, 1997, Respondent filed a Motion to Dismiss for failure to follow Local Rules. There was no previous motion or order of Court respecting the underlying issues. On September 29, 1997, Petitioner filed a timely Motion to Reconsider and/or Vacate the Order contemporaneously with Motion for Leave to File Response to Mandatory Interrogatories, Certificate of Interested Persons, Ten Days to Participate in Planning Conference, Preliminary Planning Report and Scheduling Order with an affidavit from Attorney Lecora Bowen explaining Respondent's failure to comply with Local Rules due to the illness of the pre-litigation attorney, Sharon Chavis, who subsequently expired during the pendency of this action. Judge Vining, Senior

Judge of the United States District Court for the Northern District of Georgia, denied Petitioner's Motion for Reconsideration and Leave to File and rendered all other pending motions moot. (Appendix B at 4a). Petitioner timely appeal to the Eleventh Circuit Court of Appeals, which affirmed the District Court's Order (Appendix A at 1a) and subsequently denied a petition for rehearing. (Appendix E at 10a).

The firm was not aware of the extent of attorney, Sharon Chavis' illness and how it impacted the pretrial posture of this case until it discovered that her condition was terminal and aggressively deteriorating.[1] Petitioner complied with the Local Rules and offered to pay all expenses of Respondent in its Motion to Dismiss.

The Respondent failed to file a response within ten days, as required by Rule 220-1(b)1, filing on October 17, 1997, more than eight days later than prescribed by Rule 220-1(b)1. The Court then failed to give Petitioner ten days to file a reply pursuant to Rule 220-1(b)2, rendering its decision on October 27, 1997, exactly ten days from Respondent's response.

---

1. The October 27, 1997 Judgment is devastating to Laura Davis (Petitioner), for two reasons. First, the October 27, 1997 Judgment does not completely resolve the issue of Wachovia's continuing obligation under a ten year home owner's warranty which leaves a great deal of uncertainty. Second, the Motion to Reconsider was denied on the basis that there was no explanation for the excusable neglect when, although the full extent of Attorney Chavis' condition was not known, the illness during the pendency of the pretrial period and her subsequent departure from the firm created "overwhelming circumstances and clerical inadvertence and/or mistake" due to the increased and unexpected work since all of Ms. Chavis' cases had to be reassigned.

B. Proceedings Below

On August 4, 1992, Wachovia Mortgage Company, f/k/a Wachovia, ("Respondent" herein) filed a Declaratory Judgment Motion in Fayette County Superior Court, Fayetteville, Georgia (case number 92V-1034-E). The Declaratory Judgment action was to determine the extent of warranties of a home purchased by Laura Davis ("Petitioner" herein). Petitioner filed an action in the Fulton County Superior Court, Atlanta, Georgia on September 11, 1992, (case number E-4558) for Breach of Contract, Breach of Warranty, Fraudulent and/or Negligent Misrepresentation and Intentional Infliction of Emotion Distress. The Fayette County Superior Court stayed its action on May 19, 1993. The action in the Fulton County Superior Court proceeded through vigorous discovery; i.e., among other things, more than seven (7) depositions were taken in this matter. The case was calendared for trial on August 23, 1996. However, a chief witness for Petitioner suffered a stroke and a Motion to Continue was filed and granted. When the case appeared on the trial calendar again on October 25, 1996, Petitioner again asked for a continuance because the same material witness was unavailable due to the same condition. The Fulton County Superior Court denied the motion and Petitioner dismissed her case without prejudice rather than go forward without her chief witness on October 25, 1996.

On April 23, 1997, Petitioner refiled her action in Fulton County Superior Court (case number E-59005). On May 22, 1997, Wachovia filed removal notice to United States District Court. On August 26, 1997, Wachovia filed a Motion to Dismiss pursuant to (NDGA) Rule 16.5. The Court granted the Motion to Dismiss on September 18, 1999, the twenty-first (21st) day after the Motion was filed as being unopposed for failure to comply with the Court's pretrial instructions. Prior to the Motion to Dismiss being filed there was never a Motion to

Compel or for sanctions filed and the parties were proceeding with discovery in this case.

On September 29, 1997, Petitioner moved the District Court to reconsider and/or vacate the order of dismissal pursuant to NDGA Rule 7.2E, based on excusable neglect, due to the serious illness of the attorney responsible for pretrial litigation which subsequently culminated in her death on November 4, 1998. The illness precipitated the miscalendaring of Motion to Dismiss and failure to respond to Court's pretrial instructions. Simultaneous therewith, Petitioner moved the Court for leave to file her response to Mandatory Interrogatories, Certificate of Interested Persons, Ten Days to Participate in Planning Conference, Preliminary Planning Report and Scheduling Order. Although Petitioner's motion was unopposed in that Respondent failed to file a response within ten (10) days as required by NDGA Rule 220-1(b)(1), the District Court, unlike its prior ruling on Wachovia's Motion to Dismiss, denied it although Respondent was eight (8) days late in its response.

Furthermore, the District Court failed to allow Petitioner the time allowed under NDGA Rule 220-1(b)2 to file a reply brief rendering its ruling on the tenth day after Respondent's late response.

There were no findings in this case of clear record of delay, wilful contempt or that a lesser sanction would not suffice in the District Court which contradicts the precedent of the Eleventh and Fifth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH PRECEDENT SET BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, HAS DEPARTED FROM THE ACCEPTED AND USUAL CAUSE OF JUDICIAL PROCEEDINGS, AND IS AN ABUSE OF DISCRETION.

Laura E. Davis' Petition for Writ of Certiorari should be granted because the opinion below conflicts with precedent set by the United States Court of Appeal for the Eleventh Circuit. The conflict has resulted in such a departure from the accepted and usual course of judicial proceedings to render this case violative of a due process right to a trial on the merits.

In the case sub judice, the lower court dismissed Petitioner's action pursuant to NDGA Local Rule 16.5. Rule 16.5 is a local rule and provides for sanctions for failure to comply with the Court's pre-trial instructions. The sanctions may carry a maximum penalty of dismissal of the case or entry of a default judgment. The federal counterpart to NDGA Local Rule 16.5 is Fed. Rules Civ. Proc. 41(b), 28 U.S.C.A. § 41(b), an involuntary dismissal provision permits a defendant to move for dismissal of an action "For failure of plaintiff to prosecute or to comply with these [Federal] rules or any order of court . . ." Rule 41(b) unless otherwise specified operates as an adjudication upon the merits.

The courts in applying Fed. Rules Civ. Proc. 41(b) have held that the legal standard to be applied is whether there is a "clear record of delay or willful contempt and a finding that lesser sanctions would not suffice." *Hildebrand v. Honeywell, Inc.*, 622 F.2d 179, 181 (5th Cir. 1980) and *Jones v. Graham*, 709 F.2d 1457, 1458 (11th Cir. 1983).

The courts have also held that although the standard of review on appeal is abuse of discretion, dismissal of an action with prejudice "is a sanction of last resort, applicable only in extreme circumstances." *State Exchange Bank v. Hartline*, 693 F.2d at 1352 [quoting *EEOC v. First National Bank*, 614 F.2d 1004, 1007 (5th Cir. 1980), *cert. denied*, 450 U.S. 917, 101 S. Ct. 1361, 67 L. Ed. 2d 342 (1981) and *Kilgo v. Ricks*, 983 F.2d 189, 192 (11th Cir. 1993).

In *World Thrust Films, Inc., v. International Family Entertainment, Inc., d/b/a The Family Channel, Timothy B. Robertson*, 41 F.3d 1454 (11th Cir. 1995), the court noted

> This Circuit (Eleventh) has clearly stated that because dismissal is considered a drastic action, a district court may only implement it (dismissal) as a last resort, when: ***(1) a party engages in a clear pattern of delay or willful conduct (contumacious conduct); and (2) the district court "SPECIFICALLY" finds that lesser sanctions would not suffice.***

(Emphasis added). *See, e.g. Kilgo*, 983 F.2d at 192 (citing a line of Eleventh Circuit cases which have consistently articulated this standard). *World Thrust, supra*, p. 1456. Petitioner has established in the affidavit of counsel Lecora Bowen that the reason for failure to comply with pretrial instructions were as a result of an attorney leaving unexpectedly due to illness which culminated in an atmosphere where the errors were made. Nor can it be argued that a plaintiff who fought an action vigorously during two prior state court actions and was participating in discovery at the time this case was dismissed was wilful. However, the Court's analysis need only to see if the lesser sanction requirement as promulgated in *Kilgo, supra*, was applied to the facts in this case to find that abuse of discretion is present.

In *World Thrust, supra*, the Eleventh Circuit Court of Appeals was clear that its review of a Fed. Rules of Civ. Proc. 41(b) motion for abuse of discretion would involve the two prong test as outlined above. According to the Eleventh Circuit's analysis of the issues in *World Thrust*, there could not or would not be an inquiry into the first prong of the above stated test (i.e., first prong being whether World Thrust had engaged in contumacious conduct) because the District Court failed to make the necessary finding that lesser sanctions would not suffice in this instance, as required in the second prong of the inquiry. The Court went on to say "*Therefore, we conclude that the district court failed to follow the second prong of the Eleventh Circuit standard and abused its discretion in dismissing the complaint.*" *Id.* p. 1457.

Clearly the standard in the Eleventh Circuit regarding abuse of discretion in dismissal actions requires an inquiry into whether lesser sanctions would suffice. In fact, the Eleventh Circuit has held to the view that

> Although we (the court) occasionally have found implicit in an order the conclusion that "lesser sanctions would not suffice", we have never suggested that the district court need not make that finding, which is essential before a party can be penalized for his attorney's misconduct.

Mingo v. Sugar Cane Growers Co-op of Florida, 864 F.2d 101, 102 (11th Cir. 1989) (citations omitted). The *World Thrust, supra*, Court also made it explicitly clear that the Eleventh Circuit has only inferred such a finding (i.e., that lesser sanctions would not suffice) in those instances "where lesser sanctions would have '**greatly prejudice**' defendants" (emphasis mine). *Kilgo*, 983 F.2d at 193. There was no discussion or evidence presented to show that Wachovia was

greatly prejudiced in this case. Therefore, any inference that a lesser sanction would not suffice would be against the weight of authority.

Therefore, we have before us a dismissal pursuant to Federal Rules of Civil Procedure 41(b) and NDGA Rule 16.5 which is being reviewed for an abuse of discretion. We also have clear Eleventh Circuit Precedent that a two prong analysis is necessary to determine whether the District Court's dismissal was warranted. We also have before this Court, clearly a case where the District Court did not make a finding that lesser sanctions would not suffice in this instance. There was no finding of wilfulness or a finding that Wachovia would be greatly prejudiced. Further, the case before us is not one where "lesser sanctions would have 'greatly prejudiced' the defendants". *Kilgo*, *supra*. Therefore, the District Court's refusal to follow the second prong of the Eleventh Circuit standard and ultimately dismissing the Complaint was an abuse of discretion from which Petitioner pray for relief. *World Thrust*, *supra*.

The Eleventh Circuit Court's standard clearly requires an inquiry into whether lesser sanctions would not suffice. *World Thrust*, 41 F.3d at 1455. Therefore, a finding inconsistent with any inquiry into lesser sanctions is an abuse of discretion. The record before us is devoid of any such inquiry. The record is further devoid of any inquiry into whether "lesser sanctions would have 'greatly prejudiced' the defendants". *Kilgo*, 983 F.2d at 193.

The Eleventh Circuit standard permits the courts to do equity and allow the trial upon the merits in light of the drastic sanction of dismissal of an action unless it is clearly shown that the party has been wilful or engaged in a clear pattern of delay.

CONCLUSION

This case presents a question of exceptional importance — Whether a litigant is entitled to relief from a judgment if the district court abused its discretion by not making the findings necessary for a dismissal pursuant to a 41(b) Motion according to the test promulgated in *World Thrust*, *supra*, and in *Kilgo*, *supra*. If the opinion below is allowed to stand, Laura Davis will have been denied due process because of the abuse of discretion which is inherent when a finding was not made that Wachovia would suffer great harm if lesser sanctions were granted. Furthermore, the decision below has given incomplete relief leaving the question of the unaccrued term under a ten (10) year warranty unsettled. If the opinion below is allowed to stand, Laura Davis will have been denied due process because of abuse of discretion and will forever suffer the consequences of a decision rendered as an abuse of discretion. By granting Laura Davis' petition for certiorari however, this Court can correct the correct the decision in the District Court by clearly establishing a test for abuse of discretion in the context of the 41(b) Motion, and that Rule 60(b)(6) can be used to effectuate this right.

Accordingly, Laura Davis respectfully request that her Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED SEPTEMBER 24, 1998

IN THE UNTIED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 97-9298
Non-Argument Calendar

D.C. Docket No. 1:97-CV-1489-RLV

LAURA E. DAVIS,

Plaintiff/Appellant

Versus

WACHOVIA MORTGAGE COMPANY, f.k.a FIRST WACHOVIA MORTGAGE COMPANY,

Defendant/Appellee

Appeal from the United States District Court
for the Northern District of Georgia

(September 24, 1998)

Before HATCHETT, Chief Judge, BARKETT, Circuit Judge, and KRAVITCH, Senior Circuit Judge

Appendix A

PER CURIAM:

Laura Davis ("Davis") appeals the district court's decision to deny her motion to reconsider the court's dismissal of her complaint for failure to comply with the district court's local rules. Although dismissal with prejudice is a harsh sanction, we conclude that the district court did not abuse its discretion. Therefore, we AFFIRM.

Approximately four months after this action was filed, appellee moved to dismiss due to Davis's failure to comply with the Local Rules of the Northern District of Georgia. Davis did not respond to the motion. In granting the motion to dismiss, the district court found that Davis "wilfully . . . failed to comply with the Local Rules of this Court regarding pretrial proceedings." Order of September 18, 1997. Specifically, the district court found that Davis (1) failed to file a certificate of interested parties, as required by Local Rule 3.3; (2) failed to answer mandatory interrogatories, as required by Local Rule 26.1; (3) failed to participate in the early planning conference, as required by Local Rule 16.1; and (4) failed to participate in and file a preliminary planning report and scheduling order, as required by Local Rule 16.2.

After the district court entered final judgment in favor of appellee, Davis filed a motion to reconsider the order dismissing the action. Davis asserted that she had failed to file a response to appellee's motion to dismiss due to a calendaring mistake committed by a paralegal. The district court concluded that Davis's "counsel's unfamiliarity with the time requirements for responding to motions does not constitute excusable neglect" and accordingly denied the motion for reconsideration.

Appendix A

Although a district court "may relieve a party . . . from a final judgment" on the basis of "mistake, inadvertence, surprise, or excusable neglect," Fed. R. Civ. P. 60(b), this court will set aside a district court's refusal to reconsider a final judgment only if such refusal constitutes an abuse of discretion. *See Solaroll Shade and Shutter Corp., Inc v. Bio-Energy Sys., Inc.*, 803 F.2d 1130, 1131-32 (11th Cir. 1986). We recognize that ordinarily "the dismissal of an action 'is a sanction of last resort, applicable only in extreme circumstances,' " *Carter By and Through Carter v. United States*, 780 F.2d 925, 927 (11th Cir. 1986) (quoting *Jones v. Graham*, 709 F.2d 1457, 1458 (11th Cir. 1984)); however, Davis appeals only the district court's refusal to grant her motion for reconsideration, not the district court order dismissing the case with prejudice. In light of Davis's repeated failure to comply with the district court's local rules, we cannot say that the district court abused its discretion in denying the motion for reconsideration. *Cf. Advanced Estimating Sys., Inc v. Riney*, 130 F.3d 996, 998 (11th Cir. 1997) (holding that "an attorney's misunderstanding of the plain language of a rule cannot constitute excusable neglect such that a party is relived of the consequences of failing to comply with a statutory deadline"). Accordingly, we AFFIRM.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION DATED AND FILED OCTOBER 27, 1997 AND ENTERED OCTOBER 28, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
NO. 1:97-CV-1489-RLV

LAURA DAVIS,

Plaintiff,

V.

WACHOVIA MORTGAGE f/k/a FIRST WACHOVIA MORTGAGE COMPANY,

Defendant.

ORDER

After the plaintiff failed to serve her answers to the court's mandatory interrogatories, failed to file a certificate of interested parties, and failed to confer with opposing counsel regarding the preparation of a preliminary statement and scheduling order, the defendant moved to dismiss the complaint. The plaintiff filed no opposition, and by order dated September 18, 1997, this court granted the motion. The plaintiff has now filed a motion to reconsider [Doc. No. 14].

Appendix B

Although the plaintiff's counsel states in her brief that she has not failed to comply with any order of this court, she gives no explanation for her failure to comply with the local rules of this court. Furthermore, she explains that she did not file anything in opposition to the defendant's motion to dismiss because her assistant calendared the response due date for 30 days instead of ten days.

The court finds that counsel's willingness to comply with the court's local rules, coming only after this court has granted a motion to dismiss, to be untimely. Furthermore, the court finds that counsel's unfamiliarity with the time requirements for responding to motions does not constitute excusable neglect. For these reason, the plaintiff's motion for reconsideration [Doc. No. 14] is DENIED. The other pending motions are rendered MOOT.

SO ORDERED this 27th Day of October, 1997.

/S/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
Senior United States District Judge

[ENTERED ON DOCKET October 28, 1997]

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION DATED AND ENTERED SEPTEMBER 18, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO.
1:97-CV-1489-FMH

LAURA DAVIS,

Plaintiff,

V.

WACHOVIA MORTGAGE COMPANY, f/k/a FIRST WACHOVIA MORTGAGE COMPANY,

Defendant.

ORDER

After review, the Court **GRANTS** Defendant's unopposed Motion to Dismiss [9-1] and hereby dismisses Plaintiff's Complaint.

Among other grounds, the Court finds that Plaintiff wilfully has failed to comply with the Local Rules of this Court regarding pretrial proceedings. Although Defendant notified Plaintiff about the requirements of the Local Rules, Plaintiff has failed to file a certificate of interested parties as required by Local Rule 3.3, has failed to answer the mandatory interrogatories as

required by Local Rule 26.1, has failed to participate in the early planning conference as required by Local Rule 16.1, and has failed to participate in and file a preliminary planning report and scheduling order as required by Local Rule 16.2. Therefore, the Court grants Defendant's request to dismiss this action under Local Rule 16.5.

It is **SO ORDERED,** this 18th day of September, 1997.

/S/ Frank M. Hull
FRANK M. HULL
UNITED STATES DISTRICT JUDGE

[ENTERED ON DOCKET SEP 19, 1997]

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION DATED, FILED AND ENTERED SEPTEMBER 19, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1-97-CV-1489-FMH

LAURA DAVIS,

Plaintiff,

VS.

WACHOVIA MORTGAGE COMPANY, f/k/a FIRST WACHOVIA MORTGAGE COMPANY,

Defendant.

JUDGMENT

This action having come before the court, Honorable Frank M. Hull, United States District Judge, for consideration of defendant's motion to dismiss, and the court having granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendant recover its costs of this action, and the action be, and the same hereby, is **dismissed**.

Appendix D

Dated at Atlanta, Georgia, this 19th day of September, 1997.

LUTHER D. THOMAS
CLERK OF COURT

By: /S/ Rick Goss
Deputy Clerk

Prepared, Filed and Entered
in the Clerk's Office
September 19, 1997
Luther D. Thomas
Clerk of Court

By: /S/ Rick Goss
Deputy Clerk

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED NOVEMBER 13, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-9298

LAURA E. DAVIS,

Plaintiff-Appellant,

Versus

WACHOVIA MORTGAGE COMPANY, f/k/a FIRST WACHOVIA MORTGAGE COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

BEFORE: HATCHETT, Chief Judge, BARKETT, Circuit Judge, and KRAVITCH, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by the Appellant, Laura E. Davis, is DENIED.

ENTERED FOR THE COURT:

/S/ Phyllis Kravitch
SENIOR UNITED STATES CIRCUIT JUDGE

APPENDIX F — AFFIDAVIT OF LECORA BOWEN DATED SEPTEMBER 29, 1997 WITH EXHIBIT A LOG DOCKET AS OF JANUARY 21, 1998

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NUMBER
1-97-CV-1489-FMH

LAURA DAVIS,

Plaintiff,

VS.

WACHOVIA MORTGAGE COMPANY, f/k/a FIRST WACHOVIA MORTGAGE COMPANY,

Defendant.

STATE OF GEORGIA

COUNTY OF FULTON

AFFIDAVIT OF LECORA BOWEN

PERSONALLY appeared before me, the undersigned officer, duly authorized by law to administer oaths, Lecora Bowen, who after being duly sworn, deposes and says the following:

Appendix F

1.

My name is Lecora Bowen. I am more than twenty-one years old and am under no legal disability. I have sufficient personal knowledge to make this affidavit.

2.

I represent the Plaintiff, Laura Davis, in the above-styled action.

3.

The long history of this case stems from two state court cases. The activity on the part of Plaintiff in these actions is reflected in attached Exhibit A. Exhibit A shows that Plaintiff has been extremely active in the prosecution of this matter over the years. Plaintiff has a valid claim.

4.

Plaintiff has also participated in discovery in the instant action serving interrogatories on Defendant on April 23, 1997 and responding to Defendant's interrogatories served on July 13, 1997 on August 12, 1997.

5.

Failure to respond to the mandatory interrogatories, participate in planning conference, preliminary planning report and scheduling order was result of inadvertence caused when Sharon Chavis, Esquire, who assisted on this case became increasingly sick from mid May which culminated in her

hospitalization. Unfortunately, I did not coordinate the change of responsibility and review of this matter as well as usual. We were proceeding with discovery and they were forgotten until the Motion to Dismiss was filed. I accept full responsibility for this oversight.

6.

Diann Shepherd, a paralegal in my office, inadvertently calendared the pending motion to dismiss for dismissal as a state court action with a thirty (30) day response time plus three days. Therefore, our failure to respond was not wilful.

7.

Plaintiff has participated in discovery, therefore Defendant has not been prejudiced to any significant extent. The trial of this case will not be delayed as a result. Additionally, discovery in this case has been full and vigorous in the two previous state court actions.

8.

I am prepared to fully and expeditiously litigate this case.

9.

I am prepared to pay Defendant the reasonable expenses to prepare its Motion to Dismiss. This 29 Day of September, 1997.

/S/ Lecora Bowen
Lecora Bowen

Appendix F

Sworn to and subscribed before me
this 29 day of September, 1997.

/s/ Jeanette Spivey
NOTARY PUBLIC

Appendix F

EXHIBIT A

Wachovia v. Laura Davis
Case # 92V-1034(E)
Superior Court of Fayette County

HISTORY OF CASE-PLEADINGS

09/11/92	Answer to Complaint for Declaratory Judgment
12/09/92	Defendant Laura Davis' Response to Plaintiff's Interrogatories Nos. 1-14
02/19/93	[Defendant's] Supplemental Response to Defendant's Interrogatories and Request for Production of Documents
04/16/93	Agreement to Consent Order
05/12/93	Notice of Deposition — Bird Anderson
05/12/93	Notice of Deposition — Joe Pollard
05/12/93	Notice of Deposition — Jeanette Smith
05/12/93	Notice of Deposition — Bob Merz
05/25/93	Defendant's Supplemental Response to Plaintiff's Interrogatories and Request for Production of Documents
04/27/94	Agreement to Consent Order

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06/15/94	Notice of Filing Original Deposition Transcript
06/24/94	Brief in Opposition to Plaintiff's Declaratory Judgment
08/23/94	Defendant's Second Supplement to Brief in Opposition to Plaintiff's Complaint for Declaratory Judgment

Laura Davis v. Wachovia
Case # 4558
Superior Court of Fulton County

09/11/92	Complaint for Breach of Contract, Intentional Infliction of Emotional Distress and Fraudulent Misrepresentation
12/09/92	Plaintiff's Response to Interrogatories 1-10 and Request for Production of Documents 1-8
02/12/93	Plaintiff's Response to Motion to Stay Proceedings or in the Alternative, Motion to Dismiss Without Prejudice
02/15/93	Plaintiff's Continuing Interrogatories and Request for Production of Documents [to Defendant]
02/17/93	Plaintiff's Supplemental Response to Defendant's Request for Production of Documents

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03/02/93	Plaintiff's Supplemental Response to Defendant's Interrogatories and Request for Production of Documents
04/02/93	Plaintiff's Response to Supplemental Brief in Support of Motion to Stay Proceedings for in the Alternative, Motion to Dismiss with Prejudice
04/16/93	Agreement in Consent Order
05/12/93	Notice of Deposition — Joe Pollard
05/12/93	Notice of Deposition — Bird Anderson
05/12/93	Notice of Deposition — Bob Merz
05/13/93	Notice of Deposition — Jeanette Smith
05/19/93	Plaintiff's Supplemental Response in Opposition to Defendant's Motion to Stay Proceedings or in the Alternative, Motion to Dismiss Without Prejudice
05/25/93	Plaintiff's Supplemental Response to Defendant's Interrogatories and Request for Production of Documents
07/05/94	Supplement to Brief in Opposition to Plaintiff's Complaint for Declaratory Judgment
07/06/94	Notice of Deposition — Isaac Ibanga

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07/06/94	Notice of Deposition — Judy Chesser
07/06/94	Notice of Deposition — Bernard Smith
03/04/95	Plaintiff's Request for Production of Documents to Defendant
12/13/95	Plaintiff's Pre-Trial Order
12/21/95	Plaintiff's Answer to First Amended Counterclaim of Wachovia Mortgage Company
12/22/95	Plaintiff's Answer to First Amended Counterclaim of Wachovia Mortgage Company
02/05/96	Notice of Deposition — Dr. Mouzon
02/07/96	Notice of Filing Original Deposition Transcripts
02/12/96	Plaintiff's Amended Complaint for Breach of Contract, Intentional Infliction of Emotional Distress, Negligent Misrepresentation, Breach of Warranty and Fraud
02/12/96	Plaintiff's Pre-Trial Order
02/12/96	Plaintiff's Amended Pre-Trial Order
02/14/96	Plaintiff's Response to Defendant's Motion in Limine to Exclude Requested but Unproduced Documents

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03/14/96	Plaintiff's Response to Defendant's Motion in Limine to Prohibit any Reference to or Reliance Upon Negligent Infliction of Emotional Distress
03/14/96	Plaintiff's Response to Defendant's Motion in Limine to Exclude Expert Testimony and Report
03/14/96	Plaintiff's Response to Defendant's Motion in Limine Regarding Fraud Count
03/14/96	Plaintiff's Response to Defendant's Motion in Limine to Suppress Medical Records
03/14/96	Plaintiff's Response to Defendant's Motion to Strike Plaintiff's Amended Proposed Pre-Trial Order and Amended Complaint
03/25/96	Notice of Deposition — Dr. Mouzon
03/25/96	Notice of Deposition — Dr. McGarrity
03/28/96	Plaintiff's Amendment to Complaint
04/23/96	Plaintiff's Amended Pre-Trial Order
08/22/96	Application for Continuance — Chief Witness had a stroke and unable to speak
10/25/96	Dismissal Without Prejudice (due to chief witness's stroke in August, 1996 and still unable to speak. The Court refused to grant a continuance.

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1/18/96	Plaintiff Laura Davis' Response to Defendant's Brief on Declaratory Judgment Procedural and Substantive Issues

Laura Davis v. Wachovia
Case #E-590005
Superior Court of Fulton County

04/23/97	Complaint for Breach of Contract, Breach of Warranty, Fraudulent and/or Negligent Misrepresentation and Intentional Infliction of Emotion Distress
04/23/97	Plaintiff's First Set of Continuing Interrogatories and Request for Production of Documents

Wachovia v. Laura Davis
Case # 97-CV-1489
U.S. District Court

06/10/97	Motion to Remand
07/10/97	Letter to Christen Carey
08/12/97	Plaintiff Laura Davis' Response to Defendant's First Interrogatories and Request for Production of Documents

DEPOSITIONS TAKEN

Harvey William Fergus on	03/29/93
Jeff Pope	04/15/93

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Robert T. Merz	05/25/93
Laura Davis	05/25/93
Laura Davis	05/27/93
Roland Bird Anderson	06/17/93
Henry Joel Pollard	06/17/93
Mildred J. Smith	06/17/93
Isaac Ibanga	07/13/94
Judith Chesser	07/13/94
Vernard O. Smith	07/13/94
Dr. William C. McGarrity	03/27/96

HISTORY OF CASE — CORRESPONDENCE

09/06/91	Letter to Margaret England
12/02/91	Letter to Carol Clark
02/24/92	Letter to Linda Finley
07/01/92	Letter to Linda Finley
10/30/92	Letter to Linda Finley

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02/15/93	Letter to Jeff Pope
03/26/93	Letter to Linda Finley
03/31/93	Letter to Dr. Sheila Robinson
03/31/93	Letter to Dr. William McGarrity
03/31/93	Letter to Dr. Byron T. Kelly
07/12/93	Letter to Peggy Dawson & Associates
08/18/93	Letter to Carol Clark
09/07/93	Letter to Linda Finley
09/24/93	Letter to Carol Clark
10/15/93	Letter to Carol Clark
12/06/93	Letter to Carol Clark
02/14/94	Letter to Valerie Vannoy
03/04/94	Letter to Linda Finley
04/01/94	Letter to Linda Finley
04/04/94	Letter to Linda Finley
04/15/94	Letter to Linda Finley

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04/18/94	Agreement to Consent Order
04/20/94	Letter to Judges Drew & Paschal
05/10/94	Letter to Carol Clark
07/14/94	Letter to Linda Finley
07/18/94	Letter to Carol Clark
07/27/94	Letter to Carol Clark
07/29/94	Letter to Carol Clark
08/01/94	Letter to Carol Clark
08/05/94	Letter to Isaac Ibanga
08/09/94	Letter to Carol Clark
08/12/94	Letter to Carol Clark
08/18/94	Letter to Carol Clark
09/30/94	Letter to Carol Clark
03/17/95	Letter to Judge Alexander
04/10/95	Letter to Wendy Corbett
12/13/95	Letter to Judge Alexander

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01/23/96	Letter to Ms. Davis
02/05/96	Letter to Dr. Mouzon
02/05/96	Letter to Dr. Robinson
02/05/96	Letter to Dr. Kelly
02/05/96	Letter to Isaac Ibanga
02/05/96	Letter to Jeff Pope
02/05/96	Letter to Harvey Fergus on
02/07/96	Letter to Russell Dennis
02/07/96	Letter to Christen Carey
02/12/96	Letter to Judge Alexander
02/12/96	Letter to Christen Carey
03/25/96	Letter to Dr. Mouzon
03/26/96	Letter to Dr. Griffin
04/25/96	Letter to Christen Carey
08/14/96	Letter to Judge Russell
08/22/96	Letter to Russell Dennis

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10/17/96	Letter to Jerry Blackstock
10/18/96	Letter to Robert Merz
10/18/96	Letter to Isaac Ibanga
10/18/96	Letter to Vernard Smith
10/18/96	Letter to Henry Pollard
10/18/96	Letter to Judith Chesser
10/18/96	Letter to Mildred Smith
10/21/96	Letter to Russell Dennis
10/21/96	Subpoena Russell Dennis
10/22/96	Letter to Constance Russell
10/23/96	Letter to Rosa Kinsey
11/13/96	Letter to Judge Russell
11/18/96	Letter to Judge Russell

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Proceedings include all events. CLOSED
1:97cv1489 Davis v. Wachovia Mortgage

APPEAL

5/22/97	1	NOTICE OF REMOVAL with COMPLAINT; jury demand (Pretrial instructions attached to service copies and returned to attorney for service.) FILING FEE $ 150.00 RECEIPT # 408533 (RAG) [Entry date 05/27/97]
5/22/97	2	ANSWER by defendant to complaint [1-1] DISCOVERY ends 10/19/97 (rag) [Entry date 05/27/97]
6/9/97	3	ANSWERS TO MANDATORY DISCLOSURES by defendant (rag) [Entry date 06/12/97]
6/9/97	4	Certificate of interested persons. (Dft only) (to judge) (rag) [Entry date 6/12/97]
6/10/97	5	MOTION by plaintiff to remand with attached exhibits in support. (rag) [Entry date 06/12/97]
6/24/97	6	Response by defendant to [5-1] motion to remand (rag) [Entry date 6/30/97]
7/1/97	—	SUBMITTED to Judge Frank M. Hull on [5-1] motion to remand (rag)

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7/2/97	7	ORDER by Judge Frank M. Hull DENYING [5-1] motion to remand by Laura E. Davis. Plaintiff's request for costs is DENIED (cc) (rag)
7/18/97	8	Preliminary Statement and scheduling Order. (dft only) (to judge) (rag) [Entry date 07/28/97]
7/25/97	—	ENDORSED ORDER by Judge Frank M. Hull APPROVING [8-1] preliminary statement & scheduling order. (cc) (rag) [Entry date 07/28/97]
8/27/97	9	MOTION by defendant to dismiss with brief in support (rag) [Entry date 08/28/97]
9/17/97	—	SUBMITTED to Judge Frank M. Hull on [9-1] motion to dismiss (rag)
9/18/97	10	ORDER by Judge Frank M. Hull GRANTING [9-1] motion to dismiss and dismisses plaintiff's complaint. (cc) (rag) [Entry date 09/19/97]
9/18/97	—	Case terminated. (rag) [Entry date 09/19/97]
9/19/97	11	JUDGMENT ENTERED for Wachovia Mortgage against Laura Davis (rag)

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9/26/97	12	MOTION by defendant for summary judgment with brief in support w/ affidavit of Christen C. Carey & Mildred Jeanette Smith (rag) [Entry date w/affidavit 09/30/97]
9/29/97	13	MOTION by plaintiff for leave to file response to mandatory interrogatories, certificate of interested persons, 10 days to participate in planning conference, preliminary planning report and scheduling order with brief in support (rag) [Entry date 10/02/97]
9/29/97	14	MOTION by plaintiff for reconsideration of [10-1] order, [11-1] judgment, and to vacate [11-1] judgment, [10-1] order with brief in support (rag) [Entry date 10/02/97]
10/17/97	15	Memorandum by defendant in opposition to [14-1] motion for reconsideration of [10-1] order, [11-1] judgment, [14-2] motion to vacate [11-1] judgment, [10-1] order & [13-1] motion for leave to file response to mandatory interrogatories, certificate of interested persons, 10 days to participate in planning conference, preliminary planning report & scheduling order (rag) [Entry date 10/21/97]

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10/17/97	16	Response by plaintiff to [12-1] motion for summary judgment (rag) [Entry date 10/21/97]
Volumes 3,4,5,6		
10/21/97	--	SUBMITTED to Judge Robert L. Vining Jr. on [12-1] motion for summary judgment, [13-1] motion for leave to file response, [14-1] motion for reconsideration of [10-1] order, [11-1] [14-2] motion to vacate [11-1] judgment, [10-1] order (rag)
10/27/97 Included in Volume 6	17	ORDER by Judge Robert L. Vining Jr. DENYING [14-1] motion for reconsideration of [10-1] order & [11-1] judgment. The other pending motions Included in are rendered MOOT [14-2] motion to vacate, [13-1] motion for leave & [12-1] Volume 6 motion for summary judgment by Wachovia Mortgage (cc) (rag) [Entry date 10/28/97]
11/21/97 Included in Volume 6	18	NOTICE OF APPEAL by plaintiff from [17-1] order FILING FEE $105.00 receipt # 416431 (mmw) [Entry date 11/25/97].
11/25/97	—	Notice of appeal and certified copy of docket to USCA RE: [18-1] appeal (mmw)

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1/13/98	—	Request for Certificate of Readiness from Court of Appeals regarding [18-1] appeal USCA dkt no. 97-9298 (epm) [Entry date 01/21/98]
1/21/98	—	CERTIFICATE OF READINESS OF RECORD ON APPEAL with certified copy of docket mailed to USCA re: [18-1] appeal USCA dkt. # 97-9298 (6 vols. Pleadings) (epm)

Supreme Court, U.S.
FILED
MAR 19 1999
OFFICE OF THE CLERK

No. 98-1350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LAURA DAVIS,

Petitioner,

v.

WACHOVIA MORTGAGE COMPANY f/k/a FIRST WACHOVIA MORTGAGE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether both the Eleventh Circuit Court of Appeals and the United States District Court for the Northern District of Georgia abused their discretion by not vacating the dismissal of Petitioner's case when dismissal was granted because Petitioner willfully failed to comply with the Local Rules for the Northern District of Georgia.

SUPREME COURT RULE 29.6
CORPORATE LISTING

Respondent has the following parent company: Wachovia Corporation.

Respondent does not have any nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

This action stems from the purchase of a home by Petitioner Laura Davis ("Petitioner") from Respondent Wachovia Mortgage Company ("Respondent"). Litigation has been pending between the parties since 1992. In 1996, on the eve of trial, Petitioner voluntarily dismissed her initial complaint, which was filed in the Superior Court of Fulton County, Georgia. Petitioner subsequently re-filed the instant action in the same court on April 23, 1997. Respondent removed this case to federal court on May 22, 1997.

After removal, Petitioner consistently failed to comply with the Local Rules for the Northern District of Georgia ("Local Rules").[1]

Petitioner failed to file her mandatory disclosures, violating LR 26.1, NDGa. Petitioner failed to file or to cooperate with Respondent in filing a certificate of interested persons, violating LR 3.3, NDGa. Respondent's counsel initiated discussions with Petitioner and sent her a proposed certificate on June 6, 1997. The certificate needed only to be proofed and signed. Petitioner did not authorize Respondent to file the certificate on her behalf.

Petitioner failed to initiate or to participate in an early planning conference with Respondent, violating LR 16.1, NDGa. Scheduling this conference was the Petitioner's responsibility, but Petitioner never even contacted Respondent to set a date. *Id.* Nevertheless, Respondent attempted to plan the conference and sent a letter to

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1. Respondent will hereinafter refer to the specific Local Rule by the citation form "LR __, NDGa."

Petitioner's counsel addressing these scheduling issues. Petitioner never responded to the letter.

Petitioner failed to participate in preparing the joint preliminary planning report and scheduling order, violating LR 16.2, NDGa. Again, Respondent's counsel attempted to confer with Petitioner in order to timely file this report. Petitioner failed to respond. As a result, Respondent was forced to unilaterally prepare and submit its version of the preliminary planning report and scheduling order, which was signed and made the Order of the district court.

Respondent filed a motion to dismiss on August 26, 1997 based on Petitioner's repeated failure to follow the Local Rules. Petitioner failed to respond. LR 7.1(B), NDGa ("Failure to file a response shall indicate that there is no opposition to a motion").

All of the above filings and Orders were served on Petitioner.

On September 18, 1997, Judge Frank M. Hull of the United States District Court for the Northern District of Georgia granted Respondent's unopposed motion to dismiss. In the district court's order, Judge Hull specifically held that Petitioner "wilfully has failed to comply with the Local Rules of this Court regarding pretrial proceedings." (Appendix C at 6a.)

On September 29, 1997, Petitioner filed a motion to reconsider the order and judgment and/or in the alternative motion to vacate the judgment and order. During this interim, the case was transferred to Judge Robert L. Vining. On October 27, 1997, Judge Vining denied Petitioner's motion

for reconsideration, holding that Petitioner's post-dismissal willingness to comply with the Local Rules was "untimely." Judge Vining further held that Petitioner's "unfamiliarity" with the time requirements for responding to motions did not constitute "excusable neglect."[2] (Appendix B at 5a.)

On November 21, 1997, Petitioner appealed to the Eleventh Circuit Court of Appeals, seeking review of the "Final Order of the United States District Court denying Appellant's Motion for Reconsideration and/or Motion to Vacate and Appellant's Motion to Leave to File." Petitioner did not file an appeal seeking direct review of the original order of dismissal.

On September 24, 1998, the Eleventh Circuit affirmed the district court's refusal to vacate the dismissal. The Eleventh Circuit noted that the Petitioner only appealed "the district court's refusal to grant her motion for reconsideration, not the district court order dismissing the case with prejudice." As a result of Petitioner's repeated failure to follow the Local Rules, the Eleventh Circuit stated that although the sanction of dismissal is a "sanction of last resort," it "[could not] say that the district court abused its discretion in denying the motion for reconsideration." (Appendix A at 2a-3a.)

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2. Contrary to Petitioner's claim that Respondent's response brief was "late" (Petition for Writ of Certiorari at 4), Respondents' response to Petitioner's motion for reconsideration was filed in a timely manner. *See* Fed. R. Civ. P. 6(a) and Local Rule 6.1(A), NDGa.

REASONS FOR DENYING THE WRIT

Petitioner does not suggest any split between the Circuits on the issues presented in her Petition, she does not request that the Supreme Court resolve an important question of federal statutory law, nor has she shown that the underlying decision conflicts with Supreme Court precedent. Rather, Petitioner requests that this Court hold that both the district court and appellate court abused their discretion by failing to vacate the discretionary dismissal of Petitioner's case. This is not a proper case for Supreme Court review. *See* Sup. Ct. R. 10.

Petitioner's main argument is that the district court should have specifically listed why "lesser sanctions would not [have] suffice[d]." (Petition for Writ of Certiorari at 8, *citing World Thrust Films, Inc. v. International Family Entertainment, Inc.*, 41 F.3d 1454 (11th Cir. 1995).) Petitioner argues that as a result of this purported omission, the Eleventh Circuit abused its discretion and misapplied its own case law by affirming the district court. This argument fails procedurally and substantively.

First, this argument is not properly before the Court. Petitioner did not raise this argument in her initial motion for reconsideration to the district court or in her opening brief to the Eleventh Circuit. Rather, this argument first appeared in Petitioner's reply brief to the Eleventh Circuit. Therefore, Petitioner's argument on this point was, and is, waived and should not be considered. *United States v. Kimmons*, 1 F.3d 1144, 1145-46 (11th Cir. 1993) (arguments not raised until reply brief on appellate review are waived).

Second, Petitioner has not accurately stated the standard of review in this case. As the Eleventh Circuit recognized in

its affirming opinion, Petitioner is not seeking review of the dismissal itself; rather, she is appealing the district court's denial of her motion for a reconsideration of that dismissal. Accordingly, the standard of review employed by the Eleventh Circuit was much more strict and limited.[3] *See, e.g., Villareal v. Braswell Motor Freight Lines, Inc.*, 545 F.2d 978 (5th Cir. 1977) (*per curiam*) (motions under Rule 59 and Rule 60 are "much more limited attack[s]" than a direct appeal of a dismissal).[4] Petitioner does not address this distinction.

As to the merits of Petitioner's argument, the new case law cited by Petitioner is not applicable to the case at bar. The cases cited by Petitioner address dismissals ordered *sua sponte* by the district court for want of prosecution. *See World Thrust*, 41 F.3d at 1455; *Kilgo v. Ricks*, 983 F.2d 189 (11th Cir. 1993); *Mingo v. Sugar Cane Growers Co-op of Florida*, 864 F.2d 101, 102 (11th Cir. 1989) (dismissing cases *sua sponte* for want of prosecution). Here, dismissal was by

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3. Relief under Federal Rule of Civil Procedure 59 or 60 should only be granted in "exceptional circumstances." *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984) (*citing Ackerman v. United States*, 340 U.S. 193, 202 (1950)). As a result, Petitioner must first show a justification so compelling that the district court was required to vacate the order of dismissal. *Fackelman v. Bell*, 564 F.2d 734, 736 (5th Cir. 1977). Petitioner must then show that the Eleventh Circuit abused its discretion in affirming because it did not hold that the district court abused its discretion by not vacating the dismissal. Petitioner cannot meet this onerous burden because she has failed to show "exceptional circumstances" warranting reconsideration at any stage of review.

4. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

motion and the concerns presented by a *sua sponte* dismissal — notice, etc. — are not present. *See Solaroll Shade and Shutter Corp., Inc. v. Bio-Energy Systems, Inc.*, 803 F.2d 1130, 1133 (11th Cir. 1986). Even if these cases did apply, the Eleventh Circuit was the proper arena in which to resolve any existing conflict between this case and prior Eleventh Circuit case law. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Further, the Eleventh Circuit specifically stated in its affirmance that although "ordinarily," dismissal is a "sanction of last resort," the district court did not abuse its discretion in this case by denying the motion for reconsideration. In other words, the Eleventh Circuit did consider the possibility of lesser sanctions, but agreed with the district court that a lesser sanction would not have sufficed here.[5] *See Goforth v. Owens*, 766 F.2d 1533, 1535 (11th Cir. 1985) (Eleventh Circuit may find "implicit" in the district court's order that lesser sanctions did not suffice). The Eleventh Circuit, therefore, did not "misapply" its own case law. Rather, Petitioner simply disagrees with the outcome. *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951) ("[The Supreme Court] is not the place to . . . reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other").

Finally, Petitioner weakly suggests that the district court's factual finding of "excusable neglect" was incorrect.

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5. Contrary to Petitioner's claim that there was "no discussion or evidence presented to show that Wachovia was greatly prejudiced" (Petition for Writ of Certiorari at 9-10), Respondent has contended at each level of judicial review that it has been prejudiced by Petitioner's failure to follow the Local Rules.

(Petition for Writ of Certiorari at 4-6 & 8.) As outlined amply above, Petitioner failed to follow the Local Rules and failed to respond to Respondent's motion to dismiss. The record directly contradicts Petitioner's claim that the district court did not make a "clear record of delay" or find "wilful contempt." (Appendix C at 6a-7a.) Although Petitioner's counsel attempts to shift blame for these failures to her staff, she has never explained why she herself did not follow the Local Rules. *See Pioneer Investment Services v. Brunswick Assoc. Limited Partnership*, 507 U.S. 380, 397 (1992) (standard for excusable neglect). The Petition is simply the "third bite at the apple" on this topic and should not be considered.

The district court's factual determination that Petitioner willfully violated a succession of Local Rules has survived both district and appellate review. Both a district court and the Eleventh Circuit have determined that Petitioner did not show excusable neglect and that dismissal was an appropriate sanction. These factual findings are correct and should not be disturbed. *See Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."). Certiorari should not be granted here.

CONCLUSION

This case does not merit further review by this Court. For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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